Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

CHRISTOPHER LARRY TRIBBETT,

Petitioner

versus

STATE OF MARYLAND,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Maryland's highest court rendered a final judgment holding that perfectly legal acts can serve as the exclusive basis for a conviction of the State's child abuse statute, did it call into question the statute's validity as being repugnant to the United States Constitution on the ground that it is vague in that it fails to give the ordinary citizen notice of what is forbidden and what is permitted.

CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual with no corporate affiliations and the Respondent is a state government.

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BASIS OF JURISDICTION

The opinion of the State's highest court was filed March 13, 2008. Jurisdiction to review the judgment of the Court of Appeals of Maryland is conferred by 28 U.S.C. §1257.

STATUTES INVOLVED

Md. CRIMINAL LAW Code Ann. § 3-602 (2004)[1]

§ 3-602. Sexual abuse of a minor

(a) Definitions. --

(1) In this section the following words have the meanings indicated.

(2) "Family member" has the meaning stated in § 3-601 of this subtitle.

(3) "Household member" has the meaning stated in § 3-601 of this subtitle.

(4) (i) "Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not.

(ii) "Sexual abuse" includes:

1. incest;

2. rape;

3. sexual offense in any degree;

4. sodomy; and

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[1] Hereinafter all references to "Section" or "§" are to Title 3 of the Criminal Law Article of the Maryland Annotated Code, Other Crimes Against the Person.

5. unnatural or perverted sexual practices.

(b) Prohibited. --

(1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.

(2) A household member or family member may not cause sexual abuse to a minor.

(c) Penalty. -- A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years.

(d) Sentencing. -- A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for:

(1) any crime based on the act establishing the violation of this section; or

(2) a violation of § 3-601 of this subtitle involving an act of abuse separate from sexual abuse under this section.

***Md. CRIMINAL LAW Code Ann. § 3-307* (2004)**

§ 3-307. Sexual offense in the third degree

(a) Prohibited. -- A person may not:

(1) (i) engage in sexual contact with another without the consent of the other; and

(ii) 1. employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon;

2. suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime;

3. threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or

4. commit the crime while aided and abetted by another;

(2) engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual;

(3) engage in sexual contact with another if the victim is under the age of 14 years, and the person performing the sexual contact is at least 4 years older than the victim;

(4) engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

(5) engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

(b) Penalty. -- A person who violates this section is guilty of the felony of sexual offense in the third degree and on conviction is subject to imprisonment not exceeding 10 years.

***Md. CRIMINAL LAW Code Ann. § 3-308* (2004)**

§ 3-308. Sexual offense in the fourth degree

(a) Prohibited. -- A person may not engage in:

(1) sexual contact with another without the consent of the other;

(2) except as provided in § 3-307(a)(4) of this subtitle, a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 4 years older than the victim; or

(3) except as provided in § 3-307(a)(5) of this subtitle, vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 4 years older than the victim.

(b) Penalty. --

(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of the misdemeanor of sexual offense in the fourth degree and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding $ 1,000 or both.

(2) (i) On conviction of a violation of this section, a person who has been convicted on a prior occasion not arising from the same incident of a violation of §§ 3-303 through 3-312 or § 3-315 of this subtitle or § 3-602 of this title is subject to imprisonment not exceeding 3 years or a fine not exceeding $ 1,000 or both.

(ii) If the State intends to proceed against a person under subparagraph (i) of this paragraph, it shall comply with the procedures set forth in the Maryland Rules for the indictment and trial of a subsequent offender.

STATEMENT OF THE CASE

The Petitioner was a high school physical education teacher in his first year on the job. The victim[2] was fourteen years old and a member of the girls' volleyball team when the acts of sexual contact allegedly occurred.

The student initiated numerous instant messenger chat sessions with the Petitioner on his home computer. In one session the student informed the Petitioner she had just returned from the mall with her first thong and indicated her intention to exhibit it to him after volleyball practice. The student, after lengthy interrogation by criminal investigators, told them there was consensual sexual contact between her and the Petitioner simultaneous with the thong exhibitions.

The prosecutor charged the Petitioner with several serious sexual acts, including engaging in oral sex with the alleged victim. Until there was a trial and testimony, it was theoretically possible for the Petitioner to be convicted of child abuse if the fact finder concluded acts of oral sex occurred between the student and the Petitioner, albeit consensual.

Section 3-602 provides that a *person who has...temporary care...for the supervision of a minor...commits sexual abuse* of the *minor*...if they engage in *a sexual offense in any degree* with that minor.

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[2] The term "victim" is used because the crime of *fourth degree sex offense* refers to the younger of two participants in an act of sexual contact as such. The Petitioner has always vigorously denied any sexual contact occurred, but chose not to challenge the trial court's factual findings in this regard on appeal.

Section 3-307(a)(4) provides that when a person at least 21 years old engages in oral sex with a person 14 or 15 years old it is a third degree sex offense, a felony with possible incarceration for 10 years. Section 3-308(a)(2) provides that when a person engages in oral sex with a person 14 or 15 years old and they are at least 4 years older than the victim it is a fourth degree sex offense, a misdemeanor with possible incarceration for 1 year.

In the event the person engaging in the act of oral sex under the above circumstances had temporary care of the victim, in addition to committing the crime of third or fourth degree sex offense, they would also be guilty of child abuse as provided in § 3-602(a)(4)(ii)3.

However, the trial court specifically found that no serious sexual acts occurred between these parties:

> There are several things that, probably a lot more than these, that are not in dispute. There was no oral sex; there was no sexual intercourse; there was no digital penetration. In my mind, there was no child pornography... What is clear to me is that over this period of time, there were inappropriate acts that are criminal in nature, that involve sexual offenses which is improper touching. Clear to me, four or five occasions...that there was contact, purposeful contact, where you felt Kylie's butt, not her hip; her vaginal area, rubbed against her; there's no question in my mind that all that occurred. So with respect to Count one, I have absolutely no doubt that that involves sexual exploitation of Kylie by you, that that was for your own sexual gratification. So as to Count 1, child abuse of a minor, the verdict is guilty.

In Maryland's codification of sexual crimes, at least nine at least new crimes were created directed to the age of the participants and the act involved.

The Legislature carefully set forth what sexual activity was prohibited depending upon the age of the victim, the age of the perpetrator, and the act involved. The violations that are relevant to this proceeding are as follows:

Section 3-307(a)(3):	consensual sexual contact where victim is under 14 years of age and the perpetrator is 4 or more years older than victim.
Section 3-307(a)(4):	consensual sex act where the victim is 14 or 15 years old and the perpetrator is over 21 years old.
Section 3-308(a)(1):	nonconsensual sexual contact regardless of age of either.
Section 3-308(a)(2):	consensual sexual act where victim is 14 or 15 years of age and the perpetrator is 4 or more years older than victim.

After review of the above, it is clear, consensual sexual contact with a person 14 years of age or older is not a sexual offense in any degree under the Maryland law. It cannot serve as the exclusive basis for convicting someone of child abuse.

The Petitioner did not launch a frontal attack on the constitutionality of Maryland's child abuse statute as he not believe there was need to do so.

He appealed his conviction to Maryland's intermediate appellate court, the Court of Special Appeals. The Petitioner did not argue the constitutionally of the child abuse statute. He argued that the acts of sexual touching were perfectly legal acts, and in that they served as the exclusive basis for his child abuse conviction, the conviction should be reversed. The Court of Special Appeals affirmed the conviction.

Christopher Tribbitt then caused to be filed a petition for a writ of certiorari in the Court of Appeals, Maryland's highest court. The writ was granted and the same argument was made before the Court of Appeals, the exclusive basis for the conviction constituted legal acts and the conviction should be reversed. The Court of Appeals affirmed.

The Petitioner had every reason to believe Maryland's child abuse statute was constitutional. It was not until the State's highest court rendered a final judgment holding that one could be convicted under Maryland's child abuse statute based exclusively upon clearly legal acts did the validity of the statute come into question. The issue has been properly raised and preserved so that this Court has jurisdiction to review the final judgment of Maryland's Court of Appeals.

In order to pass constitutional muster, a criminal statute must reasonably apprise one of what is permitted conduct and what acts are prohibited:

> It is established that a law fai'ls to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves... [police and prosecutors] free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, e. g., Lanzetta v. New Jersey, 306 U.S. 451; Baggett v. Bullitt, 377 U.S. 360. Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. Giaccio v. Penn 382 U. S. 399, 402-403; 86 S. Ct. 518; 15 L. Ed. 447 (1966).

Maryland's sexual crimes statutes carefully proscribe what sexual conduct is prohibited based upon the respective ages of the actors. Consensual sexual contact with a person 14 years of age or older is clearly not a crime. The State's child abuse statute makes it a crime to commit an act that involves the molestation or exploitation a minor under one's supervision and includes acts that constitute any one or more of five enumerated sex crimes.

The Petitioner did not commit any of the five specified crimes or any other crimes. The trial court entered the verdict of guilty of child abuse based exclusively upon four or five acts of consensual sexual contact. These acts clearly are not crimes under the law of Maryland.

When Maryland's highest court rendered judgment holding that the State's child abuse statute permits a

conviction based exclusively upon four or five clearly legal acts, themselves not crimes, without requiring the presence of standards which permit an ordinary person to reasonably understand what will be considered normal conduct in caring for a minor, it invalidated the State's child abuse statute as being repugnant to the Constitution.

To leave Maryland's child abuse statute intact after this ruling is leaving the police and prosecutors free to decide in each particular case what is permitted and what is prohibited in the care of a minor.

Respectfully submitted.

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break. Be back at quarter of, please.
(A recess was taken.)
THE COURT: What's next?
MR. KRATOVIL: Your Honor, that's the State's case. State reserves the right, obviously, to call rebuttal.
THE COURT: All right.
MR. BRADEN: I would make a motion for judgment of acquittal on all counts. I would like to be heard briefly, but I will, in large part, base my argument on the wall on the motion and supplemental motion that were submitted.
Your Honor, I will start with Count 2, won't argue Count 1. Count 2 is felony – the marketing and distribution and, perhaps, talent searching for child pornography. There is absolutely no evidence in this case, that Mr. Tribbitt was marketing, distributing, searching for talent, seeking out participants in the way of minors for child pornography on a distribution or commercial-type scale or any scale, for that matter. That argument would cover Count 2, Count 3, Count 4, Count 8, Count 12, Count 14, Count 16, Count 18 and Count 19.

Now, this is a duplication, Your Honor. You have alternating – when you get into the teens, you have alternating depiction, which is the production of the movie itself and then marketing, distribution, but you've

PROCEEDINGS

- - -

THE COURT: Re-calling State of Maryland vs. Christopher Larry Tribbitt, Criminal Number 6328.

MR. BRADEN: Good morning, Your Honor.

THE COURT: Morning.

MR. POLTRACK: Good morning, Your Honor.

THE COURT: Morning. Mr. Tribbitt.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: I apologize for having to bring you back this morning, but I have had a chance to review everything regarding the case and I have reviewed all the exhibits. Did you wish to renew your motion for judgment of acquittal, Mr. Braden?

MR. BRADEN: I do, Your Honor.

THE COURT: Any further argument?

MR. BRADEN: No.

THE COURT: Okay. All right. At this time, I will reserve any further rulings until I've heard the closing arguments and then we'll go forward from there. I'll hear from the State first.

MR. KRATOVIL: Your Honor, obviously, the Court has heard all the testimony. As I mentioned

to you when
24 we – in my opening, and I think the evidence has now born
25 this out. This was clearly a situation where the defendant,

. . .. There was no oral sex; there was no intercourse; there was no digital penetration. . . .

What is clear to me is that over this period of time, there were inappropriate acts that are criminal in nature, that involve sexual offenses which is improper touching. Clear to me, four or five occasions when in middle school, four or five occasions in high school, that there was contact, purposeful contact, where you felt Kylie's butt, not her hip; her vaginal area, rubbed against her; there's no question in my mind that all that occurred.

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2551

September Term 2006

CHRISTOPHER LARRY TRIBBITT

V.

STATE OF MARYLAND

Salmon,
Sharer,
Wenner, William W.
(Ret., Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: July 27, 2007

17K060006328

Christopher Tribbitt, after a bench trial in the Circuit Court for Queen Anne's County, Maryland, was convicted of sexual abuse of a minor, a felony as prohibited by Section 3-602 of the Criminal Law Article of the Maryland Code (2002). Subsection (b)(2) of Section 3-602 provides:

> A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.

The term "sexual abuse," *as* used in Section 3-602, means "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." Section 3-602(a)(4)(i). The statute further provides that "sexual abuse" includes: "1. incest; 2. rape; 3. sexual offense in any degree; 4. sodomy; and

5. unnatural or perverted sexual practices." Section 3-

602(a)(4)(ii).[1]

Mr. Tribbitt's conviction was based on proof by the State that on four or five occasions, when the victim, Kylie **D.**, was fourteen years old, and while Mr. Tribbitt was the victim's volleyball coach, Mr. Tribbitt and the victim had voluntary "sexual contact" with one another. In this appeal, the primary contention of appellant is that the State's evidence was insufficient to convict him because "[c]onsensual sexual contact by anyone with a person fourteen years of age or older was not a crime when the incidents that are charged here occurred." Whether appellant is correct depends on whether appellant's

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[1] Section 3-602(a)(4) reads:

> (i) "Sexual abuse" means an act that involves sexual Molestation or exploitation of a minor, whether physical injuries are sustained or not.
>
> (ii) "Sexual abuse" includes:
>
> 1. incest;
> 2. rape;
> 3. sexual offense in any degree;
> 4. sodomy; and
> 5. unnatural or perverted sexual practices.

(Emphasis added.)

We are to construe the word "includes" to mean "by way of illustration and not by way of limitation." Md. Ann. Code Art. 1 § 30 (1957). In other words, a list of crimes introduced by the word "includes" will be treated as a series of examples, not as an

acts of physically touching Kylie amounted to sexual "exploitation" within the meaning of Section 3-602.

THE STATE'S EVIDENCE[2]

Kylie D. was born in May of 1991. Starting in late August 2003, Mr. Tribbitt and Kylie began to form a close relationship. When Kylie was twelve-years old and a seventh-grade student at Centreville Middle School in Queen Anne's County, Mr. Tribbitt was her physical education teacher. In eighth grade, Kylie again had Mr. Tribbitt as her gym teacher.

During the second marking period of the year Kylie was in the eighth grade, Mr. Tribbitt began an informal program directed at teaching some of the middle-school girls about the game of volleyball. This informal program took place after school had finished for the day. He had after-school instructions for the girls twice a week, and by the spring of 2005, Kylie considered Mr. Tribbitt

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[2] Many of the facts set forth in Part I are disputed by appellant. Nevertheless, for appeal purposes, appellant does not dispute that there was sufficient evidence from which the trial court could have found that the facts set forth in Part I are true.

a mentor. She would frequently help him set up the volleyball nets for the afternoon program and ofttimes would be the last to leave.

Commencing in the spring of 2005, Mr. Tribbitt and Kylie began to have internet conversations with one another. Many of those conversations were highly inappropriate.

In one Internet conversation, Mr. Tribbitt told Kylie about masturbation and suggested that she "try that and then come back and tell him how it went." In a subsequent Internet conversation, Kylie advised Mr. Tribbitt that her attempt at masturbation did not work. Mr. Tribbitt then invented a story that involved Kylie and him on a couch "having intercourse." He wrote that "he would kiss [her] . . . all over . . . he would kiss [her] thigh and . . . he would then pick [her] up and set [her] down on the couch [and] . . . while he was sitting on the couch . . . would [have an orgasm] and then [she] would [also have an orgasm] . . ." After Kylie read this story on her computer, she typed a message saying that her attempt at masturbation "was better." Mr. Tribbitt then told Kylie that he had to sign off

because "his erection was hitting the top of his computer." This last-mentioned internet conversation took place before Kylie's fourteenth birthday.

In the spring of 2005, Kylie told Mr. Tribbitt that she had bought a "couple of [her] first thongs" from Victoria's Secret. Mr. Tribbitt suggested that she could show them to him one day after she put the volleyball equipment away "when [she] was walking out." Kylie told Mr. Tribbitt she would think about it but did not show the thong to him the next day. Tribbitt asked a second and third time, on separate occasions, if she had worn the thong to school. One day, after Tribbitt asked her to help put the equipment away, the following occurred, according to Kylie:

> When putting the equipment away, he was standing there and looked at me and said, well, and I said I thought I was supposed to walk and do it. He said, yeah. So he gestured to me, like this, like walk, so I started walking, I then pulled my shirt up and my pants down and showed him it.
>
> Q. [PROSECUTOR:] When you say you thought you were supposed to be walking, why did you think that?

A. Because that's what the plan was, he told me.

Q. The plan from where?

A. On the Internet he told me that we'd walk and while walking out, I'd show it to him.

Q. Now, where did that — specifically, where did that take place?

A. In the boys locker room at the middle school.

Q. What, if anything, do you recall occurring after that happening?

A. I then showed him the front of it and he pushed me from behind and put his hand on my shoulder and just looked at the front of it.

Later that evening, Tribbitt corresponded with Kylie on the internet and told her that "he wasn't sure if he could grab [her] butt." Shortly following this event, Tribbitt told Kylie that he could not "get the thought of the thong out of [his] mind" and that he was "trying to do everything" he could to see it on her again.

After Kylie's fourteenth birthday, Mr. Tribbitt and Kylie continued to have internet conversations. Sometimes in these conversations, Mr. Tribbitt told Kylie stories he had invented involving their engaging in sexual intercourse.

In mid-August 2005, Kylie entered the ninth grade and tried out for the school volleyball team coached by Mr. Tribbitt and a woman coach. She was then fourteen-years old. On the second day of tryouts, Kylie and Mr. Tribbitt were alone in the gym waiting for Kylie's mother to pick her up. At trial, during questioning by the prosecutor, Kylie testified to the events that then transpired:

> A. . . . [W]e were sitting, it was just me and him, my mom was just a little bit late to pick me up, and we were just sitting there, and he said do you want to try that hug you owe me, and I said, yeah, I guess, I don't know. He said we can go in the equipment room, and we began to hug, and I backed away because I felt kind of dumb, and he said if you would have stayed there for like two more seconds, you would have felt something. He asked me to hug him again, but this time to rub my thighs up against him.
>
> Q. Against where?

A. His penis.

Q. What, if anything, did you notice about his penis? A. It began to get an erection a little bit.

* * *

Q. After he asked you to rub up against him, what happened at that point?

A. I then backed away, and we walked out and he had —he was, like, do you want to go back in there and try to do it again, and I was like, I'm kind of scared my mom is going to be here pretty soon, and he went over to close the door because the door -- he didn't have a lock for it, on the key and once you close it, he couldn't get into it because I think Ms. Button has the key or something, but. So, he kept asking me are you sure, are you sure, are you sure, and I was like, yeah, I guess, and so he finally closed the door and that was the end of that.

Later, during the volleyball season, Mr. Tribbitt and Kylie were putting away volleyball equipment after practice, and Mr. Tribbitt "grabbed" Kylie's "butt." Later that evening, during an on-line conversation, Mr. Tribbitt

told Kylie that he was not "sure if he grabbed it hard enough or . . . wasn't sure what [she] wanted."

About three weeks prior to the end of the 2005 volleyball season, Kylie was promoted from the junior-varsity team to the varsity-volleyball squad. One or two weeks later, Mr., Tribbitt and Kylie went to an equipment room so that Kylie could be given a varsity uniform. As they were walking to the room, Mr. Tribbitt noted that his shoe was untied. Kylie testified at trial as to what next occurred:

> THE WITNESS: He saw his shoe untied, and he looked down, and he said, look, my shoe is untied, and he then . . . said — can you bend down there and tie it and while you're down there, and he winked at me and pretty much tugged on his penis like —
>
> * * *
>
> THE COURT: But he didn't say anything about his penis, right?
>
> THE WITNESS: No. He winked at me.
>
> THE COURT: So that was your

assumption?

THE WITNESS: Yes.

[THE PROSECUTOR]: After he said that, what, if any, discussion did you have with regard to doing anything?

A. I said that I would and everything, but I had that expander, and he was like, oh man, yeah, all that, and we walked into the equipment room ... .

Q. What happened once you got into the equipment room?

A. He then went into the volleyball, like, cabinet box thing and pulled out the equipment the uniforms and started getting me my uniform. He looked over and said to me, look that box right

there is big enough for you to get in and play with yourself.

Q. What did you say?

A. I said no and laughed.

Q. Okay, what happened at that point?

A. We kept getting my uniform out and stuff, and finally we got it altogether [sic], and he stood up and walked to me, and we were about to

go out, and he took me from behind and asked me if I was wearing a thong, and I said yes, and he looked down and noticed that it was the one from eighth grade, and he started playing with it and asked me to pull my shorts down in the back, so I did, and he started rubbing up my butt and my inner thighs and then I pulled my shorts up, and we walked out, and he said, I'm sorry, I wish this door had a lock on it., but it doesn't.

Q. What happened at that point?

A. We walked out, and we were sitting in the middle —we were standing in the middle of the girls' locker room, and he said to me, don't worry, there's like no one around, and he took me from behind and starting going over the front of my pants with –

Q. When you say the front of your pants, what do you mean, where?

* * *

THE WITNESS: Over my vagina.

Q. Okay. What happened at that point?

A. He then asked me if I could feel it, referring to the erection that he had, and [said yes, and he then said do you want to touch it and faced me towards him, and he took my hand, and I rubbed the he rubbed the front part of it and started walking

> towards the door, and he said to me, do you want to see it. I was like I don't know, my mom is probably here, there's probably people outside, I'm kind of scared. He kept asking me, and he had his hands over the zipper like acting as if he was going to do it, and he then went and finally tied his shoe, and he was — when he was down there, he looked up at me again and said are you sure, are you sure, and I said yes, and he then adjusted his shirt, and we walked out.

In another incident, during the volleyball season, Mr. Tribbitt "grabbed" Kylie from behind, took her pants down, and "started playing with" her thong. He then asked Kylie if she wanted him to "finger her" from behind.

In yet another incident, again while Mr. Tribbitt was walking with her from the equipment room, Mr. Tribbitt grabbed Kylie and, in Kylie' s words, "actually started, like, for the first time, really actually going down [into her] pants and got like halfway down there" to her vagina. According to Kylie, when Mr. Tribbitt reached down into her pants, he touched her vagina under her

clothing.

At the conclusion of the evidence, the trial court found Mr. Tribbitt guilty under Count 1, which alleged sex abuse. The trial judge explained his ruling as follows:

> With respect to Count 1, and this would probably apply to all counts, there are several things that, probably a lot more than these, that are not in dispute. There was no oral sex; there was no sexual intercourse; there was no digital penetration. In my mind, there was no child pornography. There clearly was somebody who was responsible and that was you, Mr. Tribbitt, in your role, not only as Kylie's teacher, coach, and what you did was obviously, completely inappropriate, and we'll get to whether it was criminal momentarily.
>
> * * *
>
> When he first met Kylie, I think that he was counseling her. He was a volleyball coach to her, but the entirety of what occurred over the time that Kylie was in middle school through the high school, when she was 13 and 14, had this relationship with Mr. Tribbitt, was his fault I agree with the State that he fostered and nourished that relationship. It may have come to a point where he should have

gotten out and he didn't. In fact, he was still having lengthy conversations with her.

With respect to the statute, 3-602, sexual abuse of a minor, . . . there's no dispute that the supervisor here was Mr. Tribbitt. The issue is whether or not, in this case, that sexual abuse is exploitation of a minor and would include sexual offense in any degree.

I, in the totality of what I heard in terms of the evidence, I would credit the testimony of Kylie, I found that, Mr. Tribbitt, your testimony only improved with age. . .

. . . if there was a fantasy in these proceedings, it came out during your cross-examination because it was complete qualification, equivocation as to each and every one of these incidents.

What is clear to me is that over this period of time, there were inappropriate acts that are criminal in nature, that involve sexual offenses which is improper touching. Clear to me, four or five occasions when in middle school, four or five occasions, in high school. that there was contact. purposeful contact. where you felt Kylie's butt, not her hip: her vaginal area. rubbed against her. There's no question in my mind that all that occurred. So with respect to Count 1, I have

> absolutely no doubt that that involves sexual exploitation of Kylie by you, that that
> was for your own sexual gratification. So as to Count 1, child abuse of a minor, the verdict is guilty.

(Emphasis added.)

II.

ANALYSIS

To prove exploitation, "[t]he State need only prove, beyond a reasonable doubt, that the parent or person having temporary or permanent custody of a child took advantage of or unjustly or improperly used the child for his or her *own* benefit." *Brackins v. State,* 84 Md. App. 157, 162 (1990).

In *Brackins,* the defendant was convicted of one count of sexual child abuse involving his twelve-year-old stepdaughter. *Id. at* 160. The defendant, Brackins, asked his stepdaughter to unbutton her shirt and expose her breasts so that he could take a semi-nude Polaroid photograph of her. *Id.* When his stepdaughter refused, Brackins partially

undressed her and took a snapshot. *Id.* He disposed of the photograph less than a minute later. *Id.* Observing that "[e]xploitation of children, through child pornography or sexual molestation and abuse, victimizes the children and possibly causes future psychological harm," this Court upheld Brackins' conviction on appeal. *Id. at* 161. We held that the evidence was sufficient to sustain the charge, because Brackins' disrobing of his stepdaughter "for his own pleasure or amusement or gratification or interest" constituted the illegal act of "exploitation." *Id.* at 162.

The case of *Raines v. State,* 142 Md. App. 206 (2002), involved a defendant charged with sexual abuse of a minor and other offenses.[3] In *Raines,* the appellant, among other things, took a video of his wife masturbating and then showed the videotape to his adopted daughter, who was a minor. In *Raines,* Judge Deborah Eyler said for this Court:

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[3]When *Raines* was decided, what now appears in Section 3-602(b)(1) was codified in Article 27, Section 35C(b)(1), of the Maryland Annotated Code (2001 Supp.). *Raines v. State,* 142 Md. App. at 216. The definition of sexual abuse at that time was codified in Article 27, Section 35C(a)(6), but was worded as Section 3-602(b)(4) is presently.

> A reasonable jury could conclude that the appellant committed child abuse when he showed his daughter a video of Mrs. Raines masturbating, taken without her knowledge or consent. The evidence was legally sufficient for reasonable jurors to find that these instances, as well as his other attempts to educate his daughter about sex, were done "for his own pleasure or amusement or gratification or interest." *Brackins v. State, supra,* 84 Md. App. [157,] 162 . . . [(1990)].

Id. at 218-19 (emphasis added).

We reject appellant's contention that "[c]onsensual sexual contact by anyone with a person fourteen years of age or older was not a crime when the incidents that are charged occurred." Sexual contact, if performed with exploitative purpose by a person having temporary custody of a child (such as a school coach), is sufficient to sustain a conviction of sexual abuse. *See Brackins,* 84 Md. App. at 162; *Raines,* 142 Md. App. at 218-19. In his brief, appellant makes no attempt to distinguish either *Raines* or *Brackins.*

There was sufficient evidence introduced by the State to support the court's finding: (1) that appellant had engaged

in "purposeful contact" with Kylie's buttocks and vaginal area, on several occasions, for his own sexual gratification and (2) that the acts occurred

while the minor was under Mr. Tribbitt's supervision. Nothing more was needed to prove appellant guilty of sexual abuse as proscribed by Section 3-602(b)(2).

In 2006, the General Assembly amended Section 3-308 of the Criminal Law Article by enacting House Bill No. 353. Section 3-308, both before and after the amendment, dealt exclusively with fourth-degree sexual offenses. The legislature changed Section 3-308 to make it a fourth-degree sexual offense for a teacher or other school official "in a position of authority" to engage in a sexual act, vaginal intercourse, or sexual contact with a minor student enrolled at the official's school.

Appellant argues that the passage of House Bill No. 353 (effective October 1, 2006) implies that, prior to 2006, it was legal for a teacher or school official to engage in

consensual sexual contact with a student age fourteen or older. Citing Article 27, Section 3-307(a)(30 of the Maryland Annotated Code, which prohibits sexual contact with victim under the age of fourteen when the perpetrator is at least four years older than victim, appellant asserts:

> [T]he State's theory is that one can be convicted of sexual abuse of a minor by the commission of what is clearly a legal act. If that was the state of the law in 2006, there was absolutely no reason to introduce or enact House Bill No. 353.

A review of the legislative history of House Bill No. 353 shows that the General Assembly had good cause to broaden the scope of Section 3-308 to cover a situation not here at issue. House Bill No. 353 was enacted about four years after the Court of Appeals decided *Anderson v. State*, 372 Md. 285 (2002). In *Anderson,* the Court reviewed the sexual-abuse conviction of Wendell Anderson, a high school teacher. The victim, a fourteen-year-old student, was not in any of Anderson's classes, nor was she a participant in

any extracurricular activities directed by Anderson. *Id.* at 288. Anderson would, however, occasionally see the victim in the school hallways and, after school, help her with math assignments and drive her home. *Id.* The sexual encounter that led to Anderson's conviction occurred after Anderson drove the victim to his house to play a game of pool. *Id.* In *Anderson,* the issue presented was "whether petitioner, a high school teacher, was a person with responsibility for supervision of a child, within the meaning of Md. Code Ann., Art. 27, § 35C(b) (2001 Supp.)." *Id. at* 287.

On appeal, Anderson contended that "the mutual, implied consent [with the victim's mother] which existed as a result of his position as a teacher ended when he and the victim left the school and thus, *as* there was no mutual consent that he drive the victim home, he did not have responsibility for her supervision." *Id. at* 294. Judge Raker, writing for the majority *in Anderson,* rejected this argument and quoted with

approval the holding of the Court of Special Appeals as follows:

> "Once a teacher assumes the task of personally transporting a child from school to home with the implied consent of the parent, he or she also assumes the responsibility of supervising that child. . . . Finally, there was no temporal break in the teacher and student relationship that existed between appellant and the child. Such a break, depending on its length and nature, can interrupt the implied consent of the parent and dispel the teacher's duty to supervise. Had appellant and [the victim] met, for example, after they had parted, at
>
> a location unconnected with Kenwood High School, we might have reached a different result in this case. But that is not the case here."

Id. (quoting *Anderson v. State,* 142 Md. App. 498, 509-10 (2002) (emphasis added)).

House Bill No. 353 was introduced specifically to outlaw the scenario contemplated by the court in the portion of the *Anderson* opinion we have emphasized, i.e., a situation where a teacher meets a student after school hours and has sexual contact with that student at a location unconnected with the school the student attends. *See Committee File,*

House Judiciary Committee, H.B. 353, Testimony, Steven Salvas (addressing the aforementioned gap identified in *Anderson); Committee File, House Judiciary Committee, H.B.* 353, Testimony, Lisae C. Jordan, Legislative Counsel, Maryland Coalition Against Sexual Assault, Inc. (noting that the law prior to enactment of House Bill No. 353 allowed a teacher to "avoid violating the criminal law by persuading the student to have sexual relations" off school grounds); *Committee File, House Judiciary Committee, H.B.* 353, Recommendation from Maryland Association Boards of Education (same).

Prior to the enactment of House Bill No. 353, no law prohibited sexual contact between a teacher and a minor student (fourteen years old or older) who attended the school where the teacher taught in those circumstances where the teacher did not have temporary custody or supervisory responsibility over the student at the point when the sexual contact occurred. House Bill No. 353 closed that loophole by adding a new Subsection (a) to Section 3-308, which provides:

Sexual offense in the fourth degree.

(a) "Person in a position of authority" defined. — In this section, "person in a position of authority":

(1) means a person who:

(i) is at least 21 years old;

(ii) is employed as a full-time permanent employee by a public or private preschool, elementary school, or secondary school; and

(iii) because of the person's position or occupation, exercises supervision over a minor who attends the school; and

(2) includes a principal, vice principal, teacher, or school counselor at a public or private preschool, elementary school, or secondary school.

The House Bill also added a new subsection (c) to Section 3-308, which reads:

(c) *Sexual abuse of a minor student by a person in a position of authority.* — (1) Except *as* provided in § 3-307(a)(4) of this subtitle or subsection (b)(2) of this section, a person in a position of authority may not engage in a sexual act or sexual contact with a minor who, at the time of the sexual act or sexual contact, is a student enrolled at a school where the person in a position of authority is employed.

(2) Except as provided in § 3-307(a)(5) of this subtitle or subsection (b)(3) of this section, a person in a position of authority may not engage in

> vaginal intercourse with a minor who, at the time of the vaginal intercourse, is a student enrolled at a school where the person in a position of authority is employed.

(Emphasis added.)

We reject appellant's contention that the sexual contact he had with Kylie must have been legal, because otherwise the amendment of Section 3-308 in 2006 would have been unnecessary. First, as shown by the *Raines and Brackins* cases, prior to 2006 it was illegal for a person, such *as* appellant, who had temporary responsibility for the supervision of a minor to have sexual contact with the minor he or she supervised if the contact was had for the teacher's pleasure or gratification or interest. Second, the gap in the law that House Bill 353 was designed to cover does not affect this case inasmuch as the amendment concerned teachers or other school officials who exercise supervision over a minor student who attends the school where the official works, but who, at the moment sexual contact takes place, is not then exercising authority over the minor. Here, appellant was

Kylie's coach who had supervisory control over her when the sexual contact took place.

Appellant also contends that "to permit [section] 3-602 to be construed [as the trial judge did] would violate the due process provision of the Maryland Declaration of Rights because it would render [section 3-602] void for vagueness." This contention was not raised below and therefore is not preserved for appellate review. *See* Md. Rule 8-131(a) (an appellate court ordinarily will not decide any non-jurisdictional issue "unless it plainly appears by the record to have been raised in or decided by the trial court"). *See also Seat Pleasant Baptist Church Bd. of Trustees v. Long,* 114 Md. App. 660, 677-78 (1997) (the constitutionality of a statute that was not raised or considered below will not be considered on appeal); *Passamichali v. State,* 81 Md. App. 731, 737 (1990) (same); *Johnson v. State,* 63

Md. App. 485, 496 (1985) (same).

Appellant also contends that the circuit court erred in granting a motion in limine to exclude certain photographs found on the hard drive of the computer owned by Kylie. At issue were over twenty digital photographs Kylie had taken of herself. Many of the pictures depicted her totally naked and in provocative poses. Several were taken after she inserted the lens into her vagina in such a way that the picture showed her vulva and clitoris. Kylie also posted those pictures on MySpace, a social networking web site (according to appellant's proffer).

In its motion in limine, the State proffered that all the photographs were taken after the sexual abuse (for which appellant was charged) had occurred. Appellant did not controvert that proffer.

Appellant opposed the State's in limine motion by contending that the photographs should be admitted because they were relevant "character evidence." Citing Maryland Rule 5-404(b), appellant's trial counsel said that the photographs "speak volumes regarding the victim's sexual

propensities, including her knowledge, motive, intent and bias in this case." At the pretrial motions hearing, appellant also contended that the photographs were relevant to Kylie's credibility.

The court granted the State's motion in limine because in its view the photographs were "irrelevant" and "not probative of anything."

In his brief, appellant argues, *inter alia,* that "[t}he photographs the alleged victim posted on MySpace should have been admitted to show Kylie was the aggressor." This argument constitutes appellate afterthought.

To preserve for appellate review a contention that the trial court erred in excluding evidence, the proponent of that evidence must, among other things, make a proffer of the relevance of that evidence. *Mack v. State,* 300 Md. 583, 603 (1984). And, on appeal, the proponent of evidence that the court excludes cannot expect an appellate court to review a reason for admission if that reason is different from that proffered below. *See White v. State,* 324 Md. 626, 640 (1999)

(argument not made at trial in support of admission of evidencecannot be asserted for first time on appeal). *See also Williams* v. *State*, 99 Md. App. 711, 724-25 (1994) (same).

Appellant's alternative contention is that the admission of the photographs would be relevant to appellant's credibility. The credibility argument was raised below. Appellant's explanation as to how the admission of the photographs may have affected Judge Ross's evaluation of Kylie's credibility is as follows:

> Demonstrating that it was Kylie's idea to wear a thong to school and exhibit it to her teacher was pivotal to [a]ppellant' s defense. Posting photographs of your private parts on MySpace is indicative of what you hope to do in the future, not about one's past or whether or not one is chaste. . . .

The second sentence of the above argument contradicts the first. If, as appellant argues, posting a picture on the internet is an act that looks to the future and not to the past, it is impossible to see how the posting of the pictures had anything

to do with Kylie's credibility in regard to her version of events as to how it came to be that she showed her teacher her thong underwear.

Appellant next argues:

> By posting photographs of herself naked on MySpace, Kylie compromised her position that she exhibited her private parts only when pressured to do so. Being able to use the photographs would have permitted the defense to demonstrate that Kylie was more prone to be untruthful about an incident where she exhibited a private part of her body and it was more likely that the [a]ppellant was telling the truth about his surprise over what she did.

In considering this argument, it must be remembered that the trial court granted the motion to exclude the pictures before any evidence was presented. Prior to trial, appellant simply argued, without any meaningful explanation, that posting the pictures was somehow relevant to the evaluation of Kylie's credibility. Such a contention, without an explanation, is facially far-fetched. And when the ruling was made, the court did not know, and would have had no way of

knowing, that Kylie, at trial, would "take the position that she exhibited her private parts when pressured to do so" by appellant. In other words, prior to the court's ruling, appellant did not proffer that the pictures were relevant to contradict that aspect of the victim's testimony. Thus, the issue is not preserved. *See White,* 324 Md. at 640. And, during trial, after Kylie testified, appellant's counsel never asked the court to reconsider its decision to exclude the evidence.

Aside from what has already been said, we are mindful that "a ruling on the relevancy of the evidence is quintessentially within the wide discretion of the trial court . . .. [Accordingly,} a trial court's determination as to the relevancy of evidence will not be reversed absent a clear showing of abuse of discretion." *Pinkney v. State,* 151 Md. App. 311, 324 (2003) (internal citations and quotations omitted). We are not persuaded that the trial court abused its discretion when it ruled that nude photographs posted by the victim after the sexual contacts here at issue occurred were not relevant.

IV.

Appellant also objects to the form of Count 1 of the indictment because that count was (purportedly) "completely devoid of facts and dates." In support of that contention, he cites the Maryland Declaration of Rights, Art. 21 ("Every man hath a right to be informed of the accusation against him. . . .") and Maryland Rule 4-202 (requiring that the time and place of the offenses be stated in the charging document "with reasonable particularity"). The first count of the initial indictment read:

> The Grand Jurors of the State of Maryland, for the body of Queen Anne's County, upon their oath do present that **CHRISTOPHER LARRY TRIBBITT,** between the 1st day of October, 2004 and the 8th day of April, **2006, at Queen Anne's County, State** of Maryland
>
> **did cause the sexual abuse to an unnamed minor, the defendant being a person who has temporary care, custody and**

responsibility for the supervision of said minor in violation of Criminal Law Article, Section 3602(b) of the Annotated Code of Maryland and against the peace, government and dignity of the State.

(Sex Abuse Minor)

Maintaining that the range of dates set forth in Count 1, was too broad, appellant demanded that the State file a bill of particulars. The State filed an initial bill of particulars and later, when forced to do so by the court, an amended bill of particulars.

The .amended bill of particulars was filed about two weeks before trial. As to each incident of sexual contact between Kylie and the appellant, the amended bill of particulars designated a two-month period during which each of the contacts was alleged to have occurred. For example, the bill of particulars said:

2. The acts constituting the crime of sexual abuse of a minor include:

* * *

> b. an incident described in the discovery in which the [d]efendant hugs the victim and then asks the victim to rub against his erect penis and requests her to return inside the room. This incident is believed to have occurred between mid-August and September, 2005. . . .

When a defendant requests a bill of particulars and receives an answer in a case involving sexual offenses, the court must take the State's response to the bill of particulars into account when assessing the requirement .that the indictment must allege facts with "reasonable particularity." *State v. Mulkey,* 316 Md. 475, 489-90 (1989). "The ability of a child to definitely state the date or dates of the offenses or to narrow the time frame of such occurrences may be seriously hampered by lack of memory." *Id.* at 482 (upholding a charging document alleging multiple sexual offenses alleged to have occurred over three consecutive summers). "[I]n the context of a sex abuse case concerning a minor, when time is not an essential element of the offense, general allegations as to time are constitutionally sufficient if the actual date of the

offense is unknown." *Harmony v. State,* 88 Md. App. 306, 313 (1991) (holding that an information that alleged that multiple sexual abuses occurred over an eight-year period satisfied Article 21 and Rule 4-202).

We reject appellant's implied contention that charges alleging sexual abuse of a minor must identify specific dates for the alleged criminal conduct.

As to appellant's explicit contentions, the amended bill of particulars provided appellant with notice of the specific incidents of abuse alleged and advised the appellant of when, within a span of no more than two months at a maximum, each of the acts occurred. Viewed together, the indictment and bill of particulars were sufficiently particularized to satisfy the requirements of both Article 21 of the Maryland Declaration of Rights and Maryland Rule 4-202.

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY APPELLANT.

IN THE COURT OF APPEALS
OF MARYLAND

No. 72

September Term, 2007

CHRISTOPHER LARRY TRIBBITT
v.
STATE OF MARYLAND

BBell, C.J.
Harrell
Battaglia
Greene
Murphy
Wilner, Alan M. (Retired, specially assigned)
Cathell, Dale R. (Retired, specially assigned)

JJ.

Opinion by Harrell, J.

Filed:

March 13, 2008

I.

Maryland Code (2002, 2007 Cum. Supp.), Criminal Law Article § 3-602 states that "'[s]exual abuse' means an act that involves sexual molestation or exploitation of a minor . . . ." Christopher Larry Tribbitt, Petitioner, convicted of violating this statute, argues essentially that § 3-602 should be given a much more restrictive meaning, with the result that his conduct in this case was not criminal. We do not agree.

II.

During the 2003 through 2006 school years, Kylie, the victim[4], was a student in a physical education class taught by Tribbitt at a Queen Anne's County public middle school. Over this time, Tribbitt and the victim grew "close."

According to Kylie's testimony at trial, Tribbitt requested, in the Spring of 2005, that she show him her thong underwear by pulling up her shirt and pulling down her pants. She complied.[5] In August 2005, at the beginning of her ninth grade year, Kylie joined the school volleyball team. Tribbitt was its coach. Over the course of the volleyball season, Tribbitt touched Kylie inappropriately on four or five occasions in the school's locker room. Kylie

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[4] Kylie was born in May 1991.

[5] The incidents recited here are in addition to numerous internet conversations of a sexual nature not recounted.

testified that he requested that she hug him and rub her thighs up against him. During this hug, she noticed Tribbitt's tumescence. Kylie also claimed that Tribbitt grabbed her "butt" as they walked through the locker room.

On one occasion, when Tribbitt's shoe was untied, he said to Kylie, "can you bend down there and tie it and while you're down there," and, w inking at her, "pretty much tugged on his penis . . . ."[6] They then walked together into the equipment room. Kylie testified that, while in the equipment room, Tribbitt "rubbed [her] butt and inner thighs." Next, they walked into the girls' locker room where Tribbitt rubbed Kylie's vaginal area through her pants.

In an encounter later during the volleyball season, Tribbitt grabbed Kylie and played with her thong. She described yet another incident where Tribbitt grabbed her and, with his hand, started "really going down [her] pants and he got like half way down there . . . ," stopping just above her vagina.

Following a bench trial on 17 November 2006 in the Circuit Court for Queen Anne's County, the trial judge made the following relevant findings of fact:

> [T]here are several things that, probably a lot more than these, that are not in dispute. There was no oral sex; there was no sexual intercourse; there was no digital penetration. In my mind, there was no child pornography. There clearly was somebody who was responsible and that was you, Mr. Tribbitt, in your role, not only as Kylie's teacher,

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[6] Kylie interpreted this as indicating that Tribbitt was suggesting that she perform oral sex on him. She did not.

> coach, and what you did was obviously, completely inappropriate, and we'll get to whether it was criminal momentarily.
>
> With respect to the statute, 3-602, sexual abuse of a minor, . . . there's no dispute that the supervisor here was Mr. Tribbitt. The issue is whether or not, in this case, that sexual abuse is exploitation of a minor and would include sexual offense in any degree.
>
> What is clear to me is that over this period of time, there were inappropriate acts that are criminal in nature, that involve sexual offenses which is improper touching. Clear to me, four or five occasions when in middle school, four or five occasions in high school, that there was contact, purposeful contact, where you felt Kylie's butt, not her hip; her vaginal area, rubbed against her. There's no question in my mind that all that occurred. So with respect to Count 1, I have absolutely no doubt that that involves sexual exploitation of Kylie by you, that that was for your own sexual gratification. So as to Count 1, child abuse of a minor, the verdict is guilty.

Tribbitt was sentenced to 25 years in prison, with all but 18 months suspended, and five years of supervised probation. The Court of Special Appeals, in Tribbitt's direct appeal, affirmed in an unreported opinion. We granted Tribbitt's petition for certiorari to consider a single question: "[m]ay sexual contact that does not constitute a sexual

offense in any degree or otherwise violate any provision of Maryland law nonetheless provide the basis for 'sexual abuse' within the meaning of Section 3-602 of the Criminal Law Article?"

II.

Maryland Rule 8-131(c) directs:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Thus, we refrain from engaging in de novo fact-finding and accept the trial court's factual findings unless they are clearly erroneous. *Glover v. State,* 368 Md. 211, 221-22, 792 A.2d 1160, 1165-66 (2002). When we review a trial court's determinations of legal questions or conclusions of law based on those findings of fact, however, the clearly erroneous standard does not apply. *Heat & Power Corp. v. Air Prods. & Chem. Inc.,* 320 Md. 584, 591, 578 A.2d 1202,

1205 (1990). Instead, we review de novo the trial court's "relation of those facts to the applicable law." *Storetrax.com, Inc. v. Gurland,* 397 Md. 37, 50, 915 A.2d 991, 998 (2007); *see also Schisler v. State,* 394 Md. 519, 535, 907 A.2d 175, 184 (2006) (noting that when an issue "involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a de novo standard o f review").

III.

Tribbitt does not challenge the facts as found by the trial court. Rather, Tribbitt contends thatMaryland Code (2002, 2007 Cum. Supp.), CriminalLaw Article § 3-602[7] does not criminalize the acts that the trial court found that he committed on Kylie. Section 3-602 states:

> **Sexual abuse of a minor.**
>
> (a) Definitions. – (1) In this section the following words have the meanings indicated.
>
> (2) "Family member" has the

[7]Unless otherwise noted, all statutory references are to Maryland Code (2002, 2007 Cum. Supp.), Criminal Law Article.

meaning stated in § 3-601 of this subtitle.

(3) "Household member" has the meaning stated in § 3-601 of this subtitle.

(4)(i)"Sexual abuse" means an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not.

(ii) "Sexual abuse" includes:

1. incest;
2. rape;
3. sexual offense in any degree;
4. sodomy; and
5. unnatural or perverted sexual practices.

(b) Prohibited. – (1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.

(2) A household member or family member may not cause sexual abuse to a minor.

(c) Penalty. – A person who violates this section is guilty of a felony and on conviction is subject to imprisonment not exceeding 25 years.

(d) Sentencing. – A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for:

> (1) any crime based on the act establishing the violation of this section; or
> (2) a violation of § 3-601 of this subtitle involving an act of abuse separate from sexual abuse under this section.

Tribbitt's main focus is on the interpretation of § 3-602(a)(4). He argues that § 3-602(a)(4), which defines sexual abuse, requires that, in order to be convicted of a violation of the statute, a defendant's particular acts as found by the trial court must be "otherwise criminal" in nature. We disagree.

The fundamental rules of statutory interpretation are well-settled. "'The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." *Bowen v. City of Annapolis*, 402 Md. 587, 613, 937 A.2d 242, 257 (2007) (quoting *Kushell v. Dep't of Natural Res.*, 385 Md. 563, 576-78, 870 A.2d 186, 193-94 (2005)). "When construing a statute, we recognize that it 'should be read so that no word, clause, sentence or phrase is rendered

superfluous or nugatory." *Collins v. State,* 383 Md. 684, 691, 861 A.2d 727, 732 (2004) (quoting *James v. Butler,* 378 Md. 683, 696, 838 A.2d 1180, 1187 (2003)). We will "neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute ...." *Price v. State,* 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003). If the plain language of the statute is unambiguous, "the inquiry as to legislative intent ends; we do not then need to resort to the various, and sometimes inconsistent, external rules of construction, for 'the Legislature is presumed to have meant what it said and said what it meant.'" *The Arundel Corp. v. Marie,* 383 Md. 489, 502, 860 A.2d 886, 894 (2004) (quoting *Toler v. Motor Vehicle Admin.,* 373 Md. 214, 220, 817 A.2d 229, 233 (2003). "If, however, the meaning of the plain language is ambiguous or unclear, we seek to discern legislative intent from surrounding circumstances, such as legislative history, prior case law, and the purposes upon which the statutory framework was based." *Lewis v. State,* 348 Md. 648, 653, 705 A.2d 1128, 1131 (1998) (citing *Haupt v. State,* 340 Md. 462, 471, 667 A.2d 179, 183

(1995)).

"It is a fundamental principle of statutory construction that criminal statutes are to be construed narrowly so that courts will not extend the punishment to cases not plainly within the language used." *Farris v. State,* 351 Md. 24, 36, 716 A .2d 237, 243 (1998), *superceded by statute on other grounds as stated in Been v. State,* 372 Md. 724, 816 A.2d 88 (2003) (internal quotation omitted). "The rule of lenity, however, is a maxim of statutory construction which serves only as an aid for resolving an ambiguity and it may not be used to create an ambiguity where none exists." *Jones v. State,* 336 Md. 255, 261, 647 A.2d 1204, 1207 (1994).

Tribbitt argues that the plain language of the statute requires that, in order to come within the statutory definition of sexual abuse, his actions must be otherwise criminal. Tribbitt notes that the list of acts that are "included" in the definition of sexual abuses in § 3-602(a)(4)(ii) all are prohibited otherwise by law.[8] Therefore, Tribbitt contends,

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[8] Tribbitt appears to acknowledge, even under his theory, that the definition of sexual abuse is not limited to the acts listed in 3-

the Legislature intended that the definition of sexual abuse embraces only acts otherwise prohibited by law. To conclude otherwise, he continues, would render § 3 -602(a)(4)(ii) superfluous. Tribbitt is incorrect in his reading of the statute.

The key to proper analysis of this argument rests primarily on *Hackley v. State,* 389 Md. 387, 885 A.2d 816 (2005), and its di scussion of the statutory meaning of the words "including" and "means." 389 Md. at 392-93, 885 A.2d at 819. In *Hackley,* we addressed the construction of a criminal statute that stated "'[s]talking' means a malicious course ofconduct that includes approaching or pursuing another person . . • Maryland Code (1957, 1996 Repl. Vol., 2001 Cum. Supp.), Article 27, § 124(a)(3); *Hackley,* 389 Md. at 392, 885 A.2d at

819.[6] We held that the words following "includes" did not make "approaching or pursuing" necess ary elements of the offense. We noted, as does Tribbitt in his brief here, that when statutory drafters use the term "means," they intend the

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602(a)(4)(ii). Instead, he contends the definition is limited to those and other criminal offenses generally.

definition to be exhaustive. *Hackley,* 389 Md. at 393, 885 A.2d at 819.[9] By contrast, when the drafters use the term "includes," it is generally intended to be used as "illustration and not . . . limitation." *Id.* (internal quotation omitted); *see also* Maryland Code (1957, 2005 Repl. Vol.), Article 1, § 30 ("The words 'includes' or 'including' mean, unless the context requires otherwise, includes or including by way of illustration and not by way of limitation.").

Tribbitt argues for the exact opposite interpretation of § 3-602(a)(4). He contends that the items following the term "includes" limit the definition of sexual abuse to being merely illustrative. As in *Hackley,* however, the term

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[9] There is even greater indication in § 3-602(a)(4) than in the stalking statute considered in *Hackley* that the Legislature did not intend for § 3-602(a)(4)(ii) to limit the scope of the definition of sexual abuse in §3-602(a)(4)(i) to other criminal conduct. The statute in *Hackley* included the phrase "that includes." The word "that" is often used as a relative pronoun that introduces a defining or restrictive clause. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE, 59 (4th ed. 2000); THE CHICAGO MANUAL OF STYLE 5.42 (14th ed. 1993). Section 3-602(a)(4) does not employ the term "that" to introduce the enumeration, thus there is no indication that the Legislature intended the term "includes" to be restrictive in this context.

"means" is exhaustive. The words following "means" form the broad definition of "sexual abuse." Therefore, "sexual abuse" is defined by the Legislature as "an act that involves sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." The list in § 3-602(a)(4)(ii) merely provides examples of acts that come within that definition. *See United States. v. Gertz,* 249 F.2d 662, 666 (9th Cir. 1957) ("The likelihood that 'includes' is used in this sense in § 11 is fortified by the fact that in one of the definitions set out in chapter 1 of title 18 (§ 9) U.S.C.A., 'means' is used instead of 'includes,' and in another such section (§ 6) both 'means' and 'includes' are used. It would therefore appear that in chapter 1, 'means' is used when the term and its definition are to be interchangeable equivalents, and 'includes' is used when it is desired to eliminate any doubt as to the inclusion in a larger class of the particular class specifically mentioned."); *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U.S. 95, 100, 62 S. Ct. 1, 4, 86 L. Ed. 65 (1941) (noting that generally "the term 'including' is not one of all-embracing definition,

but connotes simply an illustrative application of the general principle"); *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 126 n.1, 55 S. Ct. 60, 62 n.1, 79 L. Ed. 232 (1934) ("That the draftsman used these words in a different sense seems clear. The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."); *Guar. Trust Co. of N.Y. v. W. Va. Tpk. Comm'n,* 109 F. Supp. 286, 296 (S.D.W.Va. 1952) ("Clearly, by use of the word 'including' the lawmakers intended merely to list examples of known safety devices, but not to exclude others equally well known."); *Lyman v. Town of Bow Mar,* 533 P.2d 1129, 1133 (Colo. 1975) ("Further, the word 'include' is ordinarily used as a word of extension or enlargement, and we find that it was so used in this definition. To hold otherwise here would transmogrify the word 'include' into the word 'mean."); NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:7

(7th ed. 2007) ("A term who se statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means.' ... A definition which declares what a term 'means,' excludes any meaning that is not stated.").

Tribbitt's interpretation of the statute would render much of § 3-602(a)(4) nugatory. To limit the definition of "sexual abuse" to otherwise criminal acts would ignore the Legislature's statement that "'[s]exual abuse' means an act that involves sexual molestation or exploitation of a minor . . ." § 3-602(a)(4)(i). Tribbitt essentially would re-draft the statute to state that "'sexual abuse' means *an otherwise criminal act* that involves sexual molestation or exploitation of a minor." The plain language of the statute clearly contemplates that all acts of sexual molestation and exploitation fall within the definition of sexual abuse.

The textual history, although unnecessary to consider because the plain language of the statute is unambiguous, is

particularly damaging to Tribbitt's argument and confirms our view of the plain meaning. Prior to the re-codification of the Criminal Law Article, the prohibition against sexual abuse of a child was found at Maryland Code (1957, 1996 Repl. Vol., 2001 Cum. Supp.), Article 27, § 35C(a)(6)(i). Sexual abuse was defined as *"any act* that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member." (emphasis added)[10]: "Any" act may not

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[10]Maryland Code (1957, 1996 Repl. Vol., 2001 Cum. Supp.) Article 27, § 35C(a)(6)(ii) also provided that "'[s]exual abuse' includes, but is not limited to: 1. Incest, rape, or sexual offense in any degree; 2. Sodomy; and 3. Unnatural or perverted sexual practices."

> To be sure, the earlier version of the child abuse law, Art. 27, § 35C(a)(6)(ii), stated that sexual abuse "includes, but is not limited to" the examples then listed, whereas the new codification, Criminal Law Article, § 3-602(a)(4), merely precedes the list of examples with the word "includes." The Special Revisor's Note to the 2002 recodification, however, expressly points out that although there have been minor changes in wording, there has been no change in substance in the course of moving the offense from Article 27 to the Criminal Law Article. "Includes" still means "includes but is not

be read to be restricted to only acts made criminal elsewhe .

The Special Revisor's Note to the 2002 recodification states that the recodification was "derived without substantive change" from the previous version. Therefore, the proper construction of the statute is that "sexual abuse" still encompasses "any" act that involves sexual molestation or exploitation of a child.

Tribbitt's argument also is contrary to our precedent. We have noted before that the definition of "sexual abuse" is not limited to the crimes enumerated by § 3-602(a)(4)(ii). *See Cooksey v. State,* 359 Md. 1, 24, 752 A.2d 606, 618 (2000) (stating that "a charge of sexual child abuse may be sustained on evidence that would not support a conviction under the sexual offense, rape, sodomy, or perverted practice laws" (citing *Nightingale v. State,* 312 Md. 699, 708, 542 A .2d 373, 377 (1988), *superceded by statute discussed infra).* Dicta in *Cooksey* seems particularly apt:

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limited to."

Tate v. State, 176 Md. App. 365, 376, 933 A.2d 447, 454 (2007).

> With respect to Count 4, the State alleged conduct ranging from the fondling of the victim's breasts to simply rubbing against her. A jury could certainly find a single incident of some of that conduct to constitute abuse under [the sexual abuse statute], but it might well require more than one incident of other conduct in order to find the requisite "sexual molestation or exploitation."

Cooksey, 359 Md. at 24, 752 A.2d at 618.

> Whether the touching of a person's 'buttocks' would suffice as sexual contact [and therefore make the sexual abuse also a third or fourth degree sexual offense] is not clear. It might, however, depending on the circumstances, constitute sexual molestation or exploitation, even if it did not constitute sexual contact [and be otherwise criminal]. The same situation could arise from "rubbing against" the victim.

Cooksey, 359 Md. at 24 n.1, 752 A.2d at 618 n.1.

In *Nightingale,* we observed that a jury may find a defendant guilty of child sexual abuse while finding that the conduct did not otherwise constitute a sexual offense. *See*

Nightingale, 312 Md. at 708, 542 A.2d at 377 ("The problem, then, is that we cannot tell whether these general verdicts of guilty were based on the use of sexual offenses as lesser included offenses (or elements) of child abuse, or whether the child abuse verdicts were based on other reasons (e.g., some sort of sexual molestation which the juries thought did not rise to the level of a sexual offense in any degree."); *see also Tate v. State,* 176 Md. App. 365, 378-79, 933 A.2d 447, 455 (2007) ("It is enough for us to note that one or more of the jurors might possibly have concluded, rightly or wrongly, that 'rubbing outside the vagina' did not constitute sexual contact within the contemplation of a fourth-degree sexual offense law even though it may have constituted 'sexual molestation or exploitation' within the contemplation of the sexual child abuse law.")

Latching on to the sentencing provision of the statute, Tribbitt argues that, because § 3-602(d)(1) permits separate and consecutive sentences for "any crime based on the act establishing the violation of this section," the Legislature intended that the section may be violated only when the

conduct also constituted another underlying criminal offense. His interpretation of the statute in this manner is flawed. Had the Legislature intended such a limitation, the Legislature would have permitted consecutive sentences for "the crime based on the act establishing the violation of this section." In fact, § 3-602(d)(1) provides further evidence that the Legislature did not intend to limit the definition of "sexual abuse" to otherwise criminal conduct. Section 3 -602(d)(1) notes that an "act," not a "crime," may establish the basis for violation of the child sex abuse statute.

Although it is unnecessary for the disposition of this case to consider legislative history because the plain language of the statute is unambiguous, we note that Tribbitt ignores the legislative history of subsection (d). Section 3-602, in its current form, was created by Chapter 273 of the Acts of 2002.[11] Prior to that enactment, child sexual abuse was prohibited by the statute criminalizing child abuse

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[11]Chapter 167 of the Acts of 2003 increased the maximum sentence from 15 years to 25 years in prison for violation of § 3-602.

generally.[12] In addressing the general child abuse statute, in *Nightingale*, 312 Md. 699, 542 A.2d 373, we held that a

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[12]The Fiscal Note accompanying the bill provides a survey of the law and rationale behind separating sexual abuse and child abuse generally.

> [The Department of Public Safety and Correctional Services] and the Department of Health and Mental Hygiene appointed a task force to address criminal and mental health issues related to sexual offenders. The draft report of the Sex Offender Task Force proposed a series of recommendations to better protect the public from sexual offenders.
>
> Child abuse is currently defined to include both physical and sexual abuse. The task force suggests that combining these two types of abuse into a single category creates several problems, including problems in data collection regarding this offense and problems for the Division of Correction with respect to its obligations in the area of sexual offender registration. The task force has recommended that child abuse be separated into two statutes, one for physical abuse and one for sexual abuse.

MARYLAND DEPARTMENT OF LEGISLATIVE SERVICES, FISCAL NOTE, H.B. 1194, 2002 Legislative Session.

conviction for second degree sexual offense was a lesser included offense of the sexual abuse portion of the child abuse statute. In so doing, we vacated the portion of the defendant's sentence imposed under the sexual offense statute. The Legislature responded by passing Chapter 604 of the Acts of 1990 for the "express purpose of overruling the holding[] in *Nightingale* . . ." *Fisher v. State*, 367 Md. 218, 242, 786 A.2d 706, 720 (2001); *see also* the Preamble to Chapter 604 of the Acts of 1990 ("An ACT . . . FOR the purposes of reversing the holdings of the Maryland Court of Appeals in the cases of *Nightingale v. State*, 312 Md. 699, 542 A.2d 373 (1988) and *White Y. State* [318 Md. 740, 569 A.2d 1271 (1990)], by providing that if a conviction is entered against an individual for murder, rape, sexual offense, any sex crime, or any crime of physical violence, and a conviction is also entered for child abuse, a court may impose sentence for the other offenses separate from and consecutive to or concurrent with a sentence imposed for child abuse."). The language added to the general child abuse statute was carried over to the child sexual abuse statute

when the two were separated. Subsection (d) remains in substantively identical form to the language enacted in response to our holding in *Nightingale*. Accordingly, there is nothing in the plain language or legislative history that would indicate that subsection (d) should be accorded the meaning desired by Tribbitt.

Although apparently not considered by either party here, there is precedent from this Court interpreting a statute where both "means" and "includes" were used in expressing a definition. In *City of Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299, 322-323, 910 A.2d 406, 419-20 (2006) *(Carmel Realty)*, we interpreted a statute structured identically to the one at issue in the present case. The issue there was whether the Baltimore Development Corporation (BDC) was a "public body," and thus subject to the State Open Meetings Act. The definition of a "public body" expressed in the Act was as follows:

> (h)(1) "Public body" means an entity that:
> (i) consists of at least 2 individuals; and
> (ii) is created by:
> 1. the Maryland Constitution;
> 2. a State statute;
> 3. a county charter;

4. an ordinance;
5. a rule, resolution, or bylaw;
6. an executive order of the Governor; or
7. an executive order of the chief executive authority of a political subdivision of the State. (2) "Public body" includes:

(i) any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least 2 individuals not employed by the State or the political subdivision; and

(ii) The Maryland School for the Blind.

Maryland Code (1984, 2004 Rept. Vol.), State Government, § 10-502.

The BDC argued that it was not a public body because it did not meet the definition in § 10-502(h)(1). It, however, appeared to meet the definition in § 10-502(h)(2)(i). The BDC contended that § 10-502(h)(2)(i) was only intended to provide illustrative examples of the types of public bodies defined in § 10-502(h)(1). We disagreed. We held that the two portions of the statutes presented independent, alternative approaches to the definition of a

public body because "[§1 10-502(h)(2) introduces a new concept and is not a subsidiary section to § 10-502(h)(1)." *Carmel Realty,* 395 Md. at 322-23, 910 A.2d at 419-20. We noted that if the Legislature intended § 10-502(h)(2)(i) to serve as illustrative examples of the definition in § 10-502(h)(1), "it would have been made subject to the prior section and normally would have been designate d [r]§ 10-502(h)(1) . . . (iii)."'[13] *Carmel Realty,* 395 Md. at 323, 910 A.2d at 420.

Tribbitt penultimately contends that a relatively new law enacted by the General Assembly since his trial indicates that the Legislature did not intend the definition of "sexual

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[13] *Carmel Realty* is distinguishable in one respect from the present case. The statute at issue in *Cannel Realty* had two sections, the second of which "introduce[d] a new section" and a "new set of public bodies" that were distinct from those in the first section. By contrast, § 3-602(a)(4)(ii) does not list any crimes that would not otherwise constitute sexual exploitation or molestation. We need not decide here the largely academic question of whether § 3-602(a)(4)(i) and § 3-602(a)(4)(ii) constitute alternative, independent definitions of "sexual abuse" or § 3-602(a)(4)(ii) serves as an illustrative subsidiary to § 3-602(a)(4)(i). We will save that discussion for the day on which we are presented with a case where a defendant manages to commit incest, rape, commit a sexual offense, sodomize, or commit an unnatural and perverted sex practice against a minor victim without also sexually exploiting or molesting the same victim. Regardless of which construction applies, Tribbitt's contention that the definition requires an underlying criminal act is without merit.

abuse" to include his conduct. In 2006, the General Assembly amended §3-308 to prohibit consensual sexual contact between a person of authority and a student enrolled where the perpetrator is employed. Tribbitt argues that this indicates that, prior to the effective date of the amendments to §3-308,[14] his conduct was not prohibited by law. Agreeing with the State, Tribbitt acknowledges that the amendments to § 3-308 were in response to our opinion in *Anderson v. State,* 372 Md. 285, 812 A.2d 1016 (2002). *See* Statement of Stephen Salvas, Detective/S ergeant, Charles County Sheriffs Office, before the House Judiciary Committee in favor of House B ill 353 (1 March 2006) (describing the need for amendments to § 3-308 in light of *Anderson).*

In *Anderson, we* affirmed the sexual abuse conviction of a high school teacher who had sexual intercourse with a 14 year-old student enrolled at the school at which the defendant was employed. The issue was whether the defendant was a person with "responsibility for

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[14] Tribbitt's conduct occurred before the effective date of the 2006 amendments to §3-308.

supervision of a child" within the meaning of the sexual abuse statute. We noted that the conviction was proper, despite the fact that the sexual act occurred outside school property and that the student was not taught actually by the defendant, because there was no "temporal break" in the teacher's supervision of the student. *Anderson,* 372 Md. at 294-96, 812 A.2d at 1022-23. Had there been such a "temporal break," our holding in *Anderson* would have been different.[15] The Legislature saw fit to conform the statute expressly to the Majority interpretation in *Anderson,* amending § 3-308 to prohibit sexual contact between a school employee and student where, at the time of the sexual contact, the employee is employed by the school attended by the student. As a result of the 2006 amendments, any "temporal break" in the supervisory responsibilities of the school employee

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[15] Chief Judge Bell authored a dissent, joined by Judges Eldridge and Wilner, contending that the facts indicated that the defendant was not a person responsible for the supervision of the child. *Anderson,* 372 Md. at 299, 812 A.2d at 1025 (Bell, C.J., dissenting)

prospectively became irrelevant.[16] The 2006 amendments were not intended to require other criminal conduct in order to be convicted of sexual abuse under § 3-306. No such amendments were necessary, as the plain language of § 3-602 prohibits acts involving "sexual molestation or exploitation of a minor" by an adult responsible for the minor's supervision.

Tribbitt's final argument rests on the *ejusdem generis* doctrine of statutory interpretation.

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[16] "The Maryland Association of Boards of Education supported the bill, explaining that:

> Under current law, a school employee may be charged with child abuse if the conduct occurs on school property or while the student is engaged in school activities. However, sexual conduct occurring outside this custodial relationship is not subject to the charge of child abuse and no other criminal charge may be available. Under this bill, violators would be guilty of the misdemeanor of fourth degree sexual offense and subject to maximum penalties of a fine of $1,000 and imprisonment for one year.

Memorandum from John R. Woolums, Esq., Director of Governmental Relations with the Maryland Association of Boards of Education, to Maryland House of Delegates Judiciary Committee regarding House Bill 353 (1 March 2006) *available at* http://www.mabe.org/HB%20353.sex%20offenses.pdf (last visited 21 February 2008).

"[W]here the general words in a statute . . . follow the designation of particular things or classes of subjects, ... the general words in the statute will usually be construed to include only those things of the same class or general nature as those specifically antecedently mentioned." *State v. Sinclair,* 274 Md. 646, 658, 337 A.2d 703, 711 (1975).

> The doctrine of *ejusdem generis* applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

In re Wallace W., 333 Md. 186, 190, 634 A.2d 53, 55-56 (1993). "The rule of *ejusdem generis,* however, is merely a rule of construction, and cannot be invoked to restrict the meaning of words within narrower limits than the statute intends, so as to subvert its obvious purpose." *Blake v. State,*

210 Md. 459, 462, 124 A.2d 273, 274 (1956).

We have refused previously to apply the doctrine of *ejusdem generis* to this very statute.[17] In *Degren v. State*, 352 Md. 400, 428, 722 A.2d 887, 900 (1999), we stated:

> We decline to utilize the doctrine of *ejusdem generis* in construing this statute. {The sexual abuse statute] enumerates actions describing types of sexual abuse, but the general phrase, "Sexual abuse includes, but is not limited to"[18,,) precedes the enumerated list and states specifically that the list is not exhaustive. Furthermore, given general legislative policy and the purpose of the child abuse statute to protect minors

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[17] This would be an unusual situation to apply *ejusdem generis* in any event. The typical *ejusdem generis* application occurs where a statutory definition includes a list of items, followed by one general category. In this case, the opposite is true. The general terms, defining sexual abuse as "an act that involves sexual molestation or exploitation of a minor," precede the specific list of items. This provides even further indication that the Legislature intended the list of items in § 3-602 (a)(4)(ii) to be illustrative.

[18] As a result of recodification, the words "but is not limited to" were eliminated from the statute. "The Special Revisor's Note to the 2002 recodification, however, expressly points out that although there have been minor changes in wording, there has been no change in substance in the course of moving the offense from Article 27 to the Criminal Law Article. 'Includes' still means 'includes but is not limited to.'" *Tate*, 176 Md. App. at 376, 933 A.2d at 454.

> from abuse, we find it difficult to believe the General Assembly chose to limit the forms of sexual abuse punishable to only those listed in [the sexual abuse statute]. Therefore, exercising *ejusdem generis* in this context would limit the meaning of sexual abuse and subvert its obvious purpose. (internal quotation omitted).

We again decline to apply *ejusdem generis* to find the forced and unnatural interpretation of the statute urged by Tribbitt.

JUDGMENT OF THE COURT OF SPECIAL APPEALS AFFIRMED; COSTS TO BE PAID BY PETITIONER.